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No. 07-1125

In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners in this case advanced claims of two sorts against respondents: constitutional claims pressed under 42 U.S.C. § 1983 and statutory claims advanced under Title IX. Respondents urged the courts below to dismiss the constitutional claims on the merits, but those courts declined to do so; instead, both the district court and the court of appeals held as a threshold matter that Congress intended Title IX to altogether preclude the assertion of section 1983 gender discrimination claims involving educational institutions. The petition for a writ of certiorari challenged that holding. Although respondents repeated their merits arguments in opposing the petition, contending that certiorari should be denied on the factual ground that petitioners (assertedly) could not hope to prevail on their constitutional claims if the case proceeded, this Court granted review to decide the question whether Title IX precludes the assertion of constitutional gender discrimination claims under section 1983.

In their brief on the merits, respondents offer a tepid and unenthusiastic defense of the decision below. But evidently recognizing that the First Circuit's actual holding is indefensible, respondents' principal contention is that the Court should not decide the question presented at all. Instead, respondents maintain that the Court should rule on and reject petitioners' constitutional claims on the merits – the very argument that was not resolved by the courts below and has not yet been considered by any court. This attempt to evade decision of the question that the Court granted review to resolve, advanced in terms substantially identical to those argued in respondents' unsuccessful brief opposing certiorari,

should not succeed. There is no reason for the Court to depart from its usual course in cases of this sort: it should resolve the question presented and then return the case to the lower courts for resolution of any unresolved issues.

When the Court does address the question presented, it will see that respondents offer no substantial defense of the First Circuit's perverse holding that Congress intended Title IX to withdraw preexisting remedies available to redress violations of the Equal Protection Clause. Respondents simply ignore express statutory language in Title IX that shows an unambiguous congressional intent to permit continued constitutional gender discrimination litigation. They make no real attempt to reconcile the decision below either with Congress's decision to borrow Title IX's language from Title VI – a statute that had been interpreted to allow parallel section 1983 constitutional suits – or with the manifest congressional intent in Title IX to expand remedies for gender discrimination. They offer no answer to the demonstration in our opening brief that this Court's decisions establish a presumption *against* preclusion of section 1983 as a remedy for deprivations of preexisting constitutional rights. And they make no attempt to explain how Title IX's implied and (at the time of enactment) inchoate right of action reasonably could be thought to demonstrate a congressional intent to preclude use of section 1983. The decision below accordingly should be reversed and the case remanded for further proceedings.

A. The Court Should Decide The Question Presented

Respondents begin their argument by urging the Court – at some length – to disregard the question

presented in the case and rule for them on the merits, contending that petitioners' constitutional claims were not adequately alleged in their complaint, were waived below, or somehow are barred by the lower courts' ruling against them on their Title IX claim. Resp. Br. 15-32. Respondents advanced the same merits arguments to the courts below, which declined to consider them. Instead, those courts confined themselves to consideration of the threshold and logically prior question whether section 1983 constitutional claims may proceed at all. See Pet. App. 23a-25a, 60a.

As we explained in our opening brief (at 49-51), the regular procedural course in such circumstances is for this Court – which "ordinarily do[es] not decide in the first instance issues not decided below" (*Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (internal quotations omitted)) – to resolve the question presented in the petition and then to remand for "full consideration by the courts below" of additional issues like those now raised by respondents. *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004); see also, *e.g.*, *Lee* v. *Kemna*, 534 U.S. 362, 387 (2002) (where both lower courts held petitioners' "due process claim procedurally barred" and "neither court addressed it on the merits," this Court "remand[ed] the case for that purpose"). Respondents do not address this authority, make no response to this point, and fail to offer any reason for the Court to depart from its usual practice.

Instead, respondents would have this Court be the first one to address their merits contentions. But that would place matters bizarrely out of order; it would require this Court to consider issues that both courts below chose not to address (including issues

those courts are uniquely well-situated to decide, such as whether particular arguments were waived below), without any guidance from the courts that are closer to those questions and that actually heard argument on them. To say the least, it would be odd to have this Court decide and pretermit consideration of such issues by lower courts.

Respondents' contention is especially ill-taken because they presented substantially identical arguments – as to some of the points they now raise, in substantially identical language to that employed in their merits brief – in their brief opposing the petition for certiorari. See Br. in Opp. 11-22. They there urged the Court to deny review of the petition for exactly the same reasons that they now advance in asking the Court to avoid decision of the question presented. See, *e.g.*, *id.* at 12-13 (arguing petitioners "failed to allege or demonstrate an injury caused by a municipal custom or policy"); *id.* at 13 (petitioners "affirmatively waived any such claim"); *id.* at 14 (petitioners "failed to offer any factually supported, reasonably developed argument against dismissal"); *id.* at 17-22 (petitioners "failed to allege a viable equal protection claim against either the School Committee or Superintendent Dever"). In just such circumstances, however, the Court consistently has rejected attempts by respondents to evade decision of the question presented as somehow not properly in the case when, "in granting certiorari, [the Court] necessarily considered and rejected that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. at 36, 40 (1994); see, *e.g.*, *Verizon* v. *FCC*, 535 U.S. 467, 530-531 (2002); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991). The same outcome is appropriate here.

The Court accordingly should disregard respondents' contentions about the merits of petitioners' equal protection claims, resolve the question whether Title IX precludes section 1983 gender discrimination actions, and (if we prevail on that question) remand the case for further proceedings. For the sake of completeness, however, we briefly note that respondents' arguments on the merits – which generally attempt to show that petitioners did not adequately allege, or otherwise could not prevail on, their section 1983 claims – are incorrect.[1]

First, respondents argue that, in light of the First Circuit's rejection of petitioners' Title IX "deliberate indifference" claim, petitioners may not relitigate that claim on remand under section 1983. Resp. Br. 16-22. But that is not petitioners' intent. Instead, petitioners on remand will advance claims, such as those of discriminatorily disparate treatment in the investigation of student behavior or in the treatment of student complaints, that have not yet been addressed by any court. See Pet. Br. 10, 51. Such unresolved claims are not barred by the First

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[1] Respondents take issue with the statement of facts in our opening brief. See Resp. Br. 1 n.2. The specifics of the harassment suffered by petitioners' daughter, as well as the details of respondents' response to that harassment, are largely immaterial to the legal issue presented in this case. We note, however, that the facts as described in the portion of our opening brief (Pet. Br. 5-8) that is challenged by respondents are derived principally from the opinions of the lower courts and from respondent Dever's deposition. We also note that, because the district court granted respondents' motion to dismiss petitioners' section 1983 claims, any facts alleged in the complaint that bear on those claims must be taken as true unless inconsistent with factual findings made below.

Circuit's holding on Title IX – and respondents do not contend that they are.

The court of appeals evidently agrees. Had it believed that the Title IX and section 1983 contentions are identical in all respects, it presumably would have ended its analysis upon rejecting the Title IX claim because that holding would have been dispositive of the constitutional allegations. But it did not do that, instead resolving the Title IX claim and then going on to separately dispose of the constitutional allegations on the very different ground that section 1983 claims are precluded by Title IX. The First Circuit accordingly appears to believe that there remain issues to resolve in the case if section 1983 actions are not altogether barred by Title IX.

Second, respondents are incorrect in maintaining that petitioners may not pursue a section 1983 suit against respondent school committee because the complaint does not adequately allege that the discrimination suffered by their daughter was the product of municipal "custom or practice." Resp. Br. 23-24. In fact, the complaint alleges that respondents engaged in a "continuing pattern and practice" of violating "civil rights" (JA 21a), that the school lacked a written harassment policy (*id.* at 21a, 23a), and that respondents' discriminatory conduct was "persistent[]" (*id.* at 21a); it also recounted respondents' repeated refusals adequately to address the harassment of petitioners' daughter. *Id.* at 18a-20a. In a case of this sort, such allegations are more than sufficient to provide "fair notice" of petitioners' custom or practice claim and the grounds on which that claim rests. *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1964 (2007). See, *e.g.*, *Machesky* v. *Hawfield*, 2008 WL 614819, *8 (W.D. Pa. 2008) (allega-

tion that omissions by policymakers constituted a custom or policy held sufficient under *Twombly* despite a "lack of detail"); *Ruff* v. *County of Kings*, 2008 WL 4287638, *14 (E.D. Cal. 2008) (motion to dismiss denied although unconstitutional custom or policy not detailed in the complaint). See also *Powe* v. *City of Chicago*, 664 F.2d 639, 650-651 (7th Cir. 1981) (pattern of conduct directed towards a single individual may give rise to the reasonable inference of a municipal policy).

Third, respondents likewise are wrong in asserting that petitioners' disparate treatment and related claims were not advanced adequately in the complaint. Resp. Br. 28-30. The complaint alleges that petitioners' daughter has a constitutional right "to equal access to all benefits and privileges of a public education," that respondents violated "the minor plaintiff's right to equal access to education and her right to be free of sex discrimination, including *but not limited to* sexual harassment," and that respondents "condoned" the abuse suffered by their daughter. JA 23a (emphasis added). Although this language is broad enough to encompass a claim of disparate treatment, the district court's dismissal of the section 1983 claim on preclusion grounds at the outset of the litigation cut off further development of such a claim that could have been pursued against individual defendants, including possible amendment of the complaint to add additional defendants and discovery targeted to claims against individuals. Respondents' observation that petitioners did not move to amend their complaint (Resp. Br. 30) therefore is accurate, but serves to prove our point; meaningful amendment of the complaint was not possible

in light of the district court's preclusion ruling.[2] Moreover, as we suggested in our reply brief in support of the petition at the certiorari stage (at 5), material in the record offers some reason to believe that disparate treatment allegations could be established through evidence gathered in discovery.[3] In any event, these are precisely the sorts of issues that should be addressed by the district court in the first instance.

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[2] Respondents find it puzzling that petitioners did not advance a disparate treatment theory under Title IX. Resp. Br. 31-32. But there are several reasons that petitioners might have preferred to press claims of that sort under section 1983. That was the only way to seek a remedy from the individuals directly responsible for the disparate treatment, who are not subject to suit under Title IX; as we noted in our opening brief (at 38), advancing claims under section 1983 makes it possible to pursue targeted relief against the individuals responsible for the discrimination while sparing the school from liability. In addition, as we also noted in our opening brief (at 49-50), at the time the complaint in this case was filed petitioners could have sought to invoke favorable First Circuit authority addressing constitutional disparate treatment claims.

[3] Similarly, respondents are wrong in contending (at Resp. Br. 24-27, 30-31) that petitioners waived the "custom or policy" and disparate treatment arguments below. Respondents' waiver argument is belied by the very language they quote from petitioners' district court opposition to the motion to dismiss, which specifically alleges a discriminatory "policy or practice" on respondents' part and explains the basis for that allegation. See *id.* at 25. Respondents' argument that petitioners failed to set out the details of their section 1983 allegations in their opening brief to the First Circuit (see *id.* at 26, 30) is particularly misleading in this respect; the question presented by petitioners in their appeal to that court was simply whether *all* section 1983 claims are precluded by Title IX as a matter of law.

B. The Decision Below Should Be Reversed

When they finally turn to the question presented in the case, respondents simply fail to engage our arguments for reversal of the decision below. As we noted in our opening brief, the language of Title IX shows dispositively that the statute was not intended to preclude recourse to section 1983; the manifest effect of that language is confirmed by the statutory background and policy; and this Court's decisions indicate that preclusion is inappropriate in circumstances like those here. Respondents have virtually nothing to say about any of this.

Before addressing respondents' defense of the holding below, however, we make one preliminary point: respondents are wrong in contending (at Resp. Br. 32-34) that petitioners' merits brief improperly expands the scope of the question as it was presented in the petition for certiorari. The question presented in the petition set out background on the substance of Title IX and section 1983, and also described the conflict in the circuits on the preclusion issue, before presenting the question "[w]hether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions." Pet. i. Petitioners' opening merits brief simplified the form of the question presented by eliminating the background material as unnecessary in light of the grant of certiorari and, given that change, restated the question for clarity as "[w]hether Congress intended the right of action courts have implied under Title IX * * * to preclude the use of 42 U.S.C. § 1983 to present claims of unconstitutional gender discrimination in schools." Pet. Br. i. There is no substantive difference between these formulations.

This Court's Rule 24.1(a) provides expressly that "[t]he phrasing of the questions presented [in the merits brief] need not be identical with that in the petition for a writ of certiorari," although the brief may not change the "substance" of the question presented; it is not unusual and often is "desirable" "for counsel to rephrase or rearrange the points [in the question] so as to state them more clearly or accurately, or to eliminate points or merge them into a single question." Eugene Gressman, *et al.*, *Supreme Court Practice* 710 (9th ed. 2007). See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 98-99 (1976). That is what the merits brief does here.

Respondents therefore are wrong in contending that the question as stated in the petition did not challenge the preclusion of section 1983 claims against individuals. The language of the question as phrased in the petition is borrowed directly from the First Circuit's holding – that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions" (Pet. App. 24a) – and that holding expressly covered individual liability. The preclusion issue as it relates to individuals also is argued in the body of the petition. See, *e.g.*, Pet. 18-19. Respondents themselves had no uncertainty on this point at the petition stage; their brief opposing the petition addressed individual liability and contended, on the merits, that review of that question should be denied. See Br. in Opp. 17 (petitioners "fail[] to allege a viable equal protection claim against either the School Committee or Superintendent Dever"). And the question of individual liability is "essential to analysis" of the holding below and thus, at a minimum, must be considered a "subsidiary issue[] 'fairly comprised' by the question pre-

sented." *Procunier* v. *Navarette,* 434 U.S. 555, 559-560 n.6 (1978). See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995). The court below certainly believed that to be so, holding that the same preclusion rule must apply "whether the suit is brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response." Pet. App. 24a. Respondents' attempt to limit the scope of the grant accordingly should be rejected.[4]

1. On the merits, respondents agree that the question of preclusion is one of congressional intent. See Resp. Br. 34. But they altogether ignore the statutory text that provides direct and compelling evidence that Congress affirmatively did *not* intend Title IX to preclude invocation of section 1983. As we showed in our opening brief (at 22), Title IX specifically authorizes the United States to intervene in litigation "[w]henever an action has been commenced in any court of the United States seeking relief from denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of * * * sex." Pub. L. 92-318 § 906, 86 Stat. 375 (1972) (codified at 42 U.S.C. § 2000h-2). See ACLU Br. 17. Respondents do not deny that this language, enacted simultaneously with the substantive provisions of Title IX, expressly contemplated that private plaintiffs *could* continue to bring constitutional claims for gender discrimination after the enactment of Title IX – and assuredly anticipated that those

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[4] In addition, this Court's "Rule 14.1(a), of course, is prudential"; it "does not limit [the Court's] power to decide important questions not raised by the parties." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) (internal quotations omitted).

claims would proceed under section 1983. Indeed, respondents fail to address this statutory language at all. That, in itself, is fatal to their preclusion claim.

2. Respondents also have nothing to say about the other express textual evidence of Congress's intent: its use in Title IX of language borrowed directly from Title VI. We showed in our opening brief (at 16-24) that Congress's adoption of the Title VI text as a model for Title IX necessarily establishes that Congress intended to permit the parallel prosecution of Title IX and section 1983 claims. See ABA Br. 9-12. Respondents appear to accept the central premises of this argument. They do not deny that, at the time of Title IX's enactment, Title VI had been widely and uniformly interpreted to permit the assertion both of implied Title VI claims and of constitutional claims under section 1983; that this was so even when the parallel Title VI and section 1983 constitutional claims involved the same discriminatory conduct and arose out of the same nucleus of fact; or that Congress is presumed to have been, and in fact was, aware of this judicial construction of Title VI.[5] This implicit concession, too, is in itself fatal to respondents' position.

When they do address the significance of Title VI to this case, respondents declare that our "main argument against preclusion" is based on the "premise that Congress believed, in 1972, that § 1983 provided

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[5] For that matter, respondents appear to recognize that the decisions allowing claims to proceed under both Title VI and section 1983 were correctly decided (see Resp. Br. 47), although they also do not deny that the crucial consideration is Congress's perception of the law at the time it enacted Title IX.

broad remedies for sex discrimination in education." Resp. Br. 47. But that, of course, is *not* our "main argument." The dispositive point here, as we explain in our opening brief, is (1) that "Title IX was modeled after Title VI" (*Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998)), (2) that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years" (*Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696 (1979)), (3) that Title VI had been interpreted to permit the continued assertion of constitutional claims under section 1983, and (4) that, "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe* v. *New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989, 994 (2008) (internal quotations omitted). Respondents make no response at all to this point.[6]

Respondents instead attempt to distinguish Title VI on the ground that constitutional gender discrimination litigation was not well-developed in 1972, maintaining that Congress "could not have believed [in 1972] that the Equal Protection Clause of-

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[6] Respondents do cite *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982), for the proposition that "excessive focus" on Title VI is misplaced when construing Title IX. Resp. Br. 46-47 (citing 456 U.S. at 529-530). In fact, the Court there indicated only that textual differences in the substantive scope of the discrimination addressed by the two provisions (the exclusion of employment discrimination from Title VI but not from Title IX) should be given effect. See 456 U.S. at 529-531. The statutory language relating to enforcement, which is at issue here, is identical in Titles VI and IX.

fered any meaningful remedy for sex discrimination by schools." From this starting point, they conclude that Congress must have intended Title IX to preclude section 1983 constitutional claims. Resp. Br. 48. But both the premise and the conclusion of this argument are wrong. As we noted in our opening brief (at 27), the Congress that enacted Title IX was in fact well aware of the then-recent and widely noted decision of a three-judge district court holding unconstitutional the exclusion of women from the University of Virginia.[7] As we also explained in our opening brief, it cannot be thought that Title IX – legislation designed to "expand some of our basic civil rights and labor laws" (118 Cong. Rec. 5804 (1972) (Sen. Bayh)) – was intended to bar such suits. In any event, even had Congress not been aware of successful constitutional gender discrimination claims in 1972, it simply would not follow that Congress *affirmatively intended Title IX to preclude section 1983 claims* (claims of which, by respondents' hypothesis, it was unaware) – and *that* is the showing that respondents must make to prevail here. See ABA Br. 16-19.

By the same token, respondents misunderstand the significance of Congress's virtually contemporaneous approval of the proposed Equal Rights Amendment to the Constitution. Respondents take

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[7] The litigation received substantial attention in Washington, D.C. See *4 Women Sue to Enter Virginia U.*, Wash. Post, Times Herald, Aug. 31, 1969, at 34; *Coed Case Shelved*, Wash. Post, Times Herald, Oct. 1, 1969, at B5; *Sex Bias at Va. Hit by ACLU*, Wash. Post, Times Herald, May 30, 1969, at A26; *U. of Va. To Admit Coeds in 1970*, Wash. Post, Times Herald, June 24, 1969, at C5; *Women at U. of Va.*, Wash. Post, Times Herald, Sept. 9, 1969, at B4.

the ERA to show that Congress, in 1972, did not believe the Equal Protection Clause to provide complete and adequate constitutional protection against gender discrimination. Resp. Br. 48. That may well be so. But respondents' observation is beside the point here. As we argued in our opening brief (at 27), the real significance of the ERA for present purposes is that Congress anticipated that the rights created by this proposed Amendment, like all other individual rights conferred by the Constitution, would be enforceable through litigation under section 1983. See Pet. Br. 28. And it would have been exceptionally anomalous for Congress, even as it was attempting to confer express constitutional protections against gender discrimination, also to have withdrawn section 1983 as a mechanism with which to enforce those protections in a very significant category of cases. Respondents, once again, ignore this point.

For similar reasons, respondents get no further in contending that the Congress that enacted Title IX would not have thought that schools could be sued for damages under section 1983 and that "thus it makes no sense to argue * * * that Congress had some unstated intent in Title IX to add to existing § 1983 remedies for sex discrimination by schools." Resp. Br. 49. Again, this argument is wrong in both its premise and its conclusion. In fact, at the time of Title IX's enactment, Congress *would* have known that section 1983 *was* available both to obtain injunctive relief against schools[8] and to seek damages

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[8] See *Monell* v. *Dept. of Soc. Servs.*, 436 U.S. 658, 663 & n.5 (1978) (before deciding *Monell*, the Court had "decided the merits of over a score of cases brought under § 1983 in which the principal defendant was a school board"; thirteen such cases

from school officials, teachers, and school board members.[9] And in any event, the question here is not, as respondents would have it, whether Congress intended Title IX to "*add* to existing § 1983 remedies"; it is whether Congress intended Title IX to *preclude* use of section 1983. Even if it is assumed (counter-factually) that Congress had doubts in 1972 about the extent to which section 1983 could be invoked against school boards and school personnel, that would hardly demonstrate the requisite affirmative intent to make Section 1983 relief unavailable.

Finally, respondents make the same error when, pointing to "the special place of educational institutions in the law," they maintain that there is "no basis for believing that Congress, in passing Title IX, intended to impose the additional burdens of § 1983 actions on financially-strapped public schools and their employees." Resp. Br. 50. Again, the question here is not whether Title IX "*imposed*" section 1983

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were decided after *Monroe* v. *Pape*, 365 U.S. 167 (1961), but before the passage of Title IX).

[9] See, *e.g.*, *Harkless* v. *Sweeny Indep. Sch. Dis.*, 427 F.2d 319, 323 (5th Cir. 1970) ("§1983 includes school district trustees and school superintendents, acting in their representative as well as their individual capacities, within the meaning of 'person' as the term is used in §1983."); *Swan* v. *Bd. of Higher Educ. of City of New York*, 319 F.2d 56, 61 n.5 (2d Cir. 1963) (suit against college officials "could also have sought Civil Rights Act relief by way of damages"); *Bucha* v. *Illinois High School Ass'n*, 351 F. Supp. 69, 73 (N.D. Ill. 1972) ("the individual defendants can be liable for the damages sought"); see also *Tinker* v. *Des Moines Independent Comty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (Black, J., dissenting) (warning that students are "[t]urned loose with lawsuits for damages and injunctions against their teachers").

liability; it is whether Title IX *withdrew* section 1983 as a means of vindicating pre-existing constitutional rights. Moreover, respondents draw precisely the wrong conclusion from their observation that "Title IX itself[] recognizes the special place of educational institutions." *Ibid.* Title IX does indeed recognize the special role of schools – but it does so by making them the *only federally funded institutions subject to statutory liability for gender discrimination*, as a response to what Congress saw as the especially pernicious and long-lasting effects of discrimination in the education setting. See, *e.g.*, 118 Cong. Rec. 5807-5808 (1972) (Sen. Bayh). That surely does not support the notion that Congress sought to displace existing remedies for gender discrimination by schools.[10]

3. As we argued in our opening brief, the direct evidence of congressional intent makes it inappropriate to invoke the *Rancho Palos Verdes* presumption to resolve this case. But even disregarding that direct evidence, respondents offer no plausible defense of the holding below. They rely principally on *Rancho Palos Verdes* for the proposition that Congress intends any statute that provides for a private

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[10] This understanding is shared by the federal regulation effectuating Title IX, which provides that "[t]he obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by * * * any other Act of Congress or federal regulation." 34 C.F.R. § 106.6. This regulation strongly supports the view that Title IX was not intended to preclude other remedies for sex discrimination. This conclusion is especially notable because, as the Court has recognized, the Title IX regulations were "submitted to Congress for review"; Congress's "failure to disapprove" them "lends weight to the argument" that they accurately reflect the congressional intent. *North Haven*, 456 U.S. at 531, 533-534.

right of action to preclude use of section 1983 to enforce a related constitutional right. See Resp. Br. 35-36, 38-41. As we showed in our opening brief (at 30-33), however, the *Rancho Palos Verdes* presumption of preclusion applies only when plaintiffs are attempting to enforce *statutory* rights, created by Congress, for which Congress provided special remedies. In contrast, under *Rancho Palos Verdes*, "the claims available under § 1983 prior to the enactment of the [assertedly preclusive statute] *continue to be available after its enactment*." 544 U.S. at 126 (emphasis added).

As to such pre-existing claims, a contrary presumption – that Congress does *not* mean newer remedies to displace older ones – applies. See Pet. Br. 32-33. Far from supporting the decision below, *Rancho Palos Verdes* accordingly requires reversal here. Respondents make no response at all to this point.

Similarly, as we also argued in our opening brief (at 41-44), *Smith* v. *Robinson*, 468 U.S. 992 (1984) (relied upon by respondents at Br. 45) cannot be squared with the decision below. *Smith* emphasized the Court's reluctance to find that "Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim." 468 U.S. at 1012. In nevertheless holding that the EHA effectuated such preclusion, the Court relied at almost every page of its discussion on the extraordinarily "elaborate substantive and procedural requirements of the EHA" (*id.* at 1006), on "Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education" (*id.* at

1012), and on the express congressional intent that the EHA be the exclusive means of "protecting the constitutional right of a handicapped child to a public education." *Id*. at 1013. We explain in our opening brief (at 44) that *none* of these considerations is present here. Respondents make no argument to the contrary.

4. Respondents nevertheless contend that Title IX offers the sort of "comprehensive" remedy for gender discrimination in educational institutions that warrants preclusion here. Resp. Br. 37-44. This contention is wrong, for several reasons.

First, respondents evidently recognize that there are numerous areas where Title IX and the section 1983 constitutional remedy do not overlap, such as where the defendant does not accept federal funds or is the subject of one of Title IX's express exceptions. See Pet. Br. 36-37. Respondents do not offer any conceivable basis for believing that Congress could have intended to preclude the use of section 1983 in such circumstances, which would leave injured parties with *no* statutory remedy at all for invidious discrimination; respondents also do not offer any defense of lower court decisions holding use of section 1983 precluded when Title IX did not provide a cause of action. See Pet. Br. 37; ACLU Br. 22-23 n.18. Any such defense would be flatly inconsistent with this Court's holding in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982). In itself, this implicit concession is fatal to respondents' position: the Title IX remedy cannot be thought a "comprehensive" substitute for section 1983 when there are such significant discontinuities between the coverage of the two statutes. No decision of this Court has recognized preclusion in such circumstances.

Second, respondents direct their argument for preclusion to circumstances where the section 1983 claim is "virtually identical" to one that could be advanced under Title IX. Resp. Br. 36. Of course, in at least one notable respect the section 1983 claims here were not, and could not have been, "virtually identical" to those advanced under Title IX: respondent Dever was sued under section 1983 but was not subject to suit under Title IX. In any event, we showed in our opening brief (at 37-40, 47-48) that respondents' "virtually identical" test would be unworkable; before deciding whether section 1983 claims could proceed, judges using respondents' approach would have to determine at the motion to dismiss stage whether a Title IX action is available – a determination that, experience has shown, is often a difficult one. See Pet. Br. 47; ACLU Br. 25. Respondents offer no response to this point, and do not even attempt to explain how courts could address this problem.

Moreover, as we also argue in our opening brief (at 38-39), respondents' approach would undermine what this Court has described as the important effect that the availability of suits against individual defendants may have in deterring constitutional violations. It would mean that Congress, in enacting Title IX, insulated from liability individual school officials who are responsible for implementing policies that work serious and blatant deprivations of constitutional rights. Respondents' argument also takes no account of this Court's seeming suggestion in *Gebser* that limitations in Title IX do "not affect any right of recovery" in a suit brought against a defendant "in his individual capacity * * * under 42 U.S.C. § 1983." 524 U.S. at 292. And it disregards the pre-Title IX decisions that allowed "virtually identical"

Title VI and section 1983 claims to proceed. See Pet. Br. 19-21 (collecting cases). Respondents have nothing to say about any of these points.

Third, respondents attempt to analogize this case to *Rancho Palos Verdes*, arguing that limitations on the Title IX action – specifically, its restriction to institutional defendants and the unavailability of punitive damages – would be "evaded" and rendered "meaningless" if section 1983 actions were not precluded. Resp. Br. 42-44. As we have noted, this invocation of the *Rancho Palos Verdes* presumption has no application in a case like this one, where (1) there is direct evidence of congressional intent not to preclude use of section 1983 and (2) section 1983 is invoked to assert pre-existing constitutional rights. But respondents' contention is, in any event, incorrect on its own terms because the circumstances in *Rancho Palos Verdes* differed fundamentally from those here.

In that case, recourse to section 1983 would have rendered wholly nugatory the limitations Congress imposed on the special cause of action it provided to enforce rights created by the Telecommunications Act of 1996. Absent preclusion, plaintiffs seeking to enforce those rights always would bring suit under section 1983 and the Telecommunications Act's enforcement provision would be rendered a dead letter. See Pet. Br. 30-32. In contrast, the limits that courts have recognized in the Title IX context will continue to have substantial application even if section 1983 suits may proceed.

After all, many potential Title IX defendants are not subject to suit under section 1983 at all. Discrimination by *private* institutions was a significant focus of the congressional Title IX debate (see, *e.g.*,

118 Cong. Rec. 5804-5808 (1972) (Sen. Bayh)), and the statute bars gender discrimination by the many nonpublic educational institutions that accept federal funds. Limits on actions against such institutions, which may proceed *only* under Title IX, are entirely unaffected by section 1983. Similarly, respondents themselves state that, in some respects, Title IX's substantive bar on discrimination has broader scope than does the Equal Protection Clause because the Constitution, but not the statute, permits gender discrimination that is supported by an important government interest. Resp. Br. 41. If that is so, suits in such circumstances also could proceed only under Title IX. As a consequence, the restrictions on the Title IX action are far from "meaningless," notwithstanding the availability of a section 1983 remedy for gender discrimination by public educational institutions.[11]

Fourth, respondents find it immaterial to the preclusion analysis that the Title IX private action has been implied by the courts, arguing that private remedies are part of Title IX's "overall remedial scheme." Resp. Br. 40. Of course, we fully agree with the Court's holding in *Cannon* that Congress expected and intended judicial implication of a private Title IX remedy. But respondents' observation misses the relevant point. The question here is whether the implied action provides a basis from which the Court can reasonably draw the conclusion

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[11] Although respondents also point to Title IX's administrative enforcement provision (Resp. Br. 37-38), the Court repeatedly has "stressed that a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.'" *Blessing* v. *Freestone*, 520 U.S. 329, 347 (1997) (citation omitted).

that Congress intended to preclude invocation of section 1983. And on this, as we argued in our opening brief (at 45-48), it seems most improbable that Congress would have intended to bar use of section 1983 while leaving it to the courts to imply an alternative action and to establish the contours of that remedy. Moreover, such a conclusion would require an extraordinarily expansive reading of the implied Title IX action, understanding it not only to provide a remedy, but also to impliedly repeal a previously available cause of action that is expressly provided by another statute. No precedent of this Court supports such a conclusion. Although we made this point in our opening brief, respondents offer no response.

Fifth, respondents are wrong in contending that the same standard governs the decision (1) to preclude recourse to section 1983 and (2) to create a common law constitutional remedy under *Bivens*. See Resp. Br. 51-53. The Court's *Bivens* doctrine reflects its reluctance to permit judicial creation of constitutional causes of action and to substitute judicial for legislative judgment about the proper scope of remedies in an area where Congress as acted: "[W]e decline 'to create a new substantive legal liability without legislative aid and as at the common law' because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Bush* v. *Lucas*, 462 U.S. 367, 389-90 (1983) (internal citations omitted); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988). But Congress has acted expressly to provide a remedy in section 1983, and in this context the Court is reluctant to *preclude* the cause of action. See *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994) (sec-

tion 1983 preclusion will be found only in "exceptional cases").

Indeed, the *Bivens* doctrine substantially undermines respondents' position. The Court's more recent *Bivens* decisions presume that an explicit legislative remedy generally precludes judicial implication of an action directly from the Constitution. Here, however, respondents ask the Court to hold that a cause of action *implied* by the courts from Title IX precludes use of the *explicit* remedy provided by Congress in section 1983. Thus, while *Bivens* demonstrates this Court's preference for remedies explicitly created by statute over those that are judicially inferred, respondents here would have a judicially implied remedy trump the one expressly articulated by Congress. There is no support in this Court's decisions for such a peculiar result.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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NOVEMBER 2008